suggestion to or on behalf of the accused that evidence in rebuttal should be tendered; the application was not made until the Court resumed ten days later. And does *R. v. Howarth*[8] confine such further evidence to the accused, or may the defence call *other* witnesses?

The whole matter is very much one within the discretion of the Court below, but the discretion must be exercised most guardedly, and never, I think, if it can be interpreted as unfavourable to the accused.

After consideration of the authorities I have cited, others I have studied, and from the general circumstances of the case, I distinguish the law in this country from that in England by holding that whereas in England the Court *should not* call a witness after the close of the defence unless something has arisen *ex improviso,* which no human ingenuity could foresee, *on the part of the accused;* in Malaya the power so vested in the Court by virtue of section 425 of the Criminal Procedure Code may be exercised after the close of the defence if the further evidence appears essential to the just determination of the case.

But should this further evidence prove adverse to the accused (it is arguable if the same principle is applicable should the further evidence prove adverse to the prosecution) then opportunity must be afforded the defence to cross-examine, and to call evidence in rebuttal.

Therefore as this was not done in the Court below the appeal on this point succeeds.

Learned Counsel for the appellant submitted that during the trial in the Court below a certain atmosphere arose hostile and prejudicial to the accused. I am happy to observe that he in no way made improper suggestions against the learned District Judge, and expressly disassociated himself with the paragraphs of the petition of appeal which endeavoured to impute bias. It seems to me from the final paragraph of the grounds of judgment that the learned District Judge did not receive during the course of the trial the support which he is entitled to expect from the prosecuting officer and learned Counsel who there appeared for the accused. If this is so I trust it will not again be necessary for this Court to comment thereon.

The conviction and sentence imposed by the Court below are set aside, and in exercise of the powers contained in section 316(b) of the Criminal Procedure Code I order the accused to be committed for trial in this Court.

Conviction set aside.

WONG AH KEE v. PUBLIC PROSECUTOR

[A. Cr. J. (Evans J.) May 6, 1948]

[Ipoh — Criminal Appeal No. 22 of 1948]

Criminal Procedure Code (Cap. 6), s. 422 — Defect in charge — Excise Enactment (Cap. 133), s. 13(i) — Charge of possession of distilling apparatus — Still — Proof of nature of articles found — Omission of word "knowingly" in charge.

In this case the appellant was convicted of possession of distilling apparatus for distilling intoxicating liquor an offence under s. 13(i) of the Excise Enactment. On appeal it was argued (a) that the charge was bad as the word "knowingly" was left out in it; (b) that there was insufficient proof that the articles found were component parts of a still.

Held: (1) the defect in the charge did not embarrass the accused in making his defence and could be cured under s. 422 of the Criminal Procedure Code; (2) the *onus* was on the prosecution to prove clearly that the articles found in fact form a still for distilling intoxicating liquor and as they had failed to do so in this case the conviction must be quashed.

Case referred to:—

(1) *Lomas v. Peek* (1947) 2 All E.R. 574.

MAGISTRATE'S CRIMINAL APPEAL.

S. N. Veerasamy for the appellant.

Evans J. : — In this case the appellant was charged with having in his possession distilling apparatus for distilling intoxicating liquor and thereby committing an offence under section 13(i) of the Excise Enactment. Mr. Veerasamy for the appellant objected that the charge was, on the face of it, bad as the offence prescribed by the section is that of "knowingly" keeping or having in his possession any still. This is undoubtedly so, and the charge should have contained this word, but there are other considerations in determining the case.

In a very recent case, that of *Lomas v. Peek*[1] almost the same objection was taken, the words said to be omitted being "knowingly and wilfully permitting." That case largely turned on the wording of the Criminal Justice Act, 1925, and the words were held to be technical terms. That has no direct bearing on this case, but the principle behind it is much the same. The case is one which might fall within section 422 of the Criminal Procedure Code, and I should be prepared to exercise my powers under that section were it necessary. The principal consideration is whether the omission embarrassed the accused in making his defence. The proof of knowledge is, by the presumption in sub-section (ii) of section 13, thrown upon

the defendant. The defendant, however, was defended by counsel, who was perfectly well aware of this and, in fact, raised the same objection before the Magistrate. I do not think there is any substance in this point.

There is, however, a more fundamental objection which goes to this knowledge, and which is essential to raising the presumption referred to: the unsatisfactory evidence of possession of a still. In this case, what the prosecuting officer properly described as a tank, a vessel resembling a bitumen drum, a piece of piping and a vessel described as a "frying pan", both by the prosecution and defence, were produced. They were found in different parts of the defendant's house and out-house. The principal evidence that they are a still seems to come from Yahya bin Junid, who states: "I know it is a still as there is a hole in the vat and also a mark inside the vat." In cross-examination, he stated: "In my experience the frying pan has always been used as a condenser." Where the still is all of a piece, or is manufactured, or even labelled, as such by the maker, it may be sufficient to produce the article and refer to it as a still. A still may, however, be made from a common kettle and a piece of rubber tubing, or even from a kettle and some cold body. An efficient still, however, would seem to require complete control of the vapour. The retort produced in this Court had no head at all. With the hole referred to, any heavy plate might serve the purpose, but the outer rim is at present bent and the hole is 7" below the head. What is meant by the second quotation from Yahya I cannot clearly understand. An efficient condenser would seem to be a cooling chamber mainly enclosed. A frying pan might be used as a receptacle for the distillation, and so might any other household vessel.

It is not for the prosecution to put witnesses in the box to give matters of opinion, but to state facts on which the Court can make the necessary finding. The learned Magistrate said in his Grounds of Judgment: "I believed that the accused knew of the existence of the seemingly useless broken handle of the supposed water ladle and that it should fit the hole in the still vat confirmed my belief that the exhibits formed a still." What the words following "vat" mean, or what the sequence of thought is, is not clear. What the prosecution had to prove was that the articles were in fact a still for distilling intoxicating liquor upon which it was for the defence to shew if they could that this was not within their knowledge. There should be clear demonstration that the articles found form a still for distilling intoxicating liquor. That the articles had been used for distilling would afford *prima facie* evidence.

The mere fact that a raid was made upon the defendant's house would seem to indicate that the prosecution had more evidence than they chose to call. The second quotation from Yahya apparently means the same. The prosecution may not be bound to disclose their source of information, but if they do not give all the evidence available they are not likely to be successful except in very clear cases.

I do not think there is any sufficient evidence given to prove the alleged nature of these articles. The appeal, therefore, will be allowed and the conviction quashed.

Appeal allowed.

ANG EE LOCK v. SNG CHENG SIONG

[O. C. J. (Murray-Aynsley C.J.) June 22, 1948]

[Singapore — Civil Suit No. 319 of 1947]

Partnership — Claim to be a partner — Laches.

In this case the plaintiff had been a partner of the defendant in the business of Chop Heap Chuan from June 1st 1941 till early in 1942, when the active operations of the business ceased. During the Japanese occupation and afterwards till September 1947 the premises were occupied by sub-tenants and while the defendant brought a number of actions to recover possession the plaintiff remained quiet. It was only in August 1947, after an order for possession of the premises had been obtained by the defendant, that the plaintiff made a claim to be a partner in the Chop.

Held: the plaintiff in this case was guilty of laches and therefore it would be inequitable to make an order in his favour.

Case referred to:—

(1) *Lindsay Petroleum Co. v. Hard* (1874) L.R. 6 P.C. 239.

ACTION.

R. H. Green for the plaintiff.

N. A. Mallal for the defendant.

Murray-Aynsley C.J.: — This case arises out of a partnership. From June 1st, 1941, the plaintiff and the defendant carried on business under the style of Chop Heap Chuan, at No. 250 Rochore Road in this city. The business transacted was never extensive and active operations came to an end early in 1942. On April 26th, 1942, the premises were sub-let apparently at the same rent as that payable by the chop and for the time being nothing further happened. According to the defendant an express agreement in writing was made by the parties providing for the dissolution of the partnership on the terms that the defendant should take over both the assets and the liabilities. This agreement, which would conclude the matter, is missing.